

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re: : Chapter 11  
:   
**INFOTELECOM, LLC,** : Case No. 11-18945  
:   
Debtor. : Judge Jessica E. Price Smith

**DEBTOR'S EMERGENCY MOTION FOR ENTRY OF ORDER  
(I) ENFORCING THE AUTOMATIC STAY AGAINST AT&T AND  
(II) AWARDING SANCTIONS FOR AT&T'S WILLFUL STAY VIOLATION**

Infotelecom, LLC, debtor and debtor in possession (the "Debtor"), moves the Court for entry of an order pursuant to Sections 105(a) and 362 of Title 11 of the United States Code (the "Bankruptcy Code") (i) enforcing the automatic stay against AT&T and (ii) awarding to Debtor sanctions in the form of its fees and expenses incurred in connection with and as a result of AT&T's willful stay violations and scheduling a subsequent hearing to consider the appropriate amount of those sanctions. Certain AT&T ILECs (defined below) have taken actions in state public utility commission proceedings that willfully violate the automatic stay imposed by Section 362 of the Bankruptcy Code, and the Debtor anticipates that other AT&T entities with whom it deals may take similar actions in other state proceedings. Additionally, following the commencement of this case, AT&T suspended certain of the Debtor's accounts. Accordingly, the Debtor requests that the Court enforce the automatic stay against AT&T on an emergent basis and award the Debtor sanctions in an amount to be determined at a hearing following an expedited hearing on this Motion.<sup>1</sup>

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<sup>1</sup> Concurrently with the filing of this Motion, the Debtor is filing a motion asking the Court to conduct an expedited hearing on this Motion.

## **Jurisdiction and Venue**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

## **Background**

2. On October 18, 2011 (the “Petition Date”), the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its affairs as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. The Debtor is the communications carrier of choice for some of the nation’s most innovative technologies. The Debtor specializes in voice over Internet Protocol services (“VoIP”), which allow customers to make and receive voice communications over the internet. The Debtor’s Initial Report to the Court filed on the Petition Date (the “Initial Report”) provides a detailed overview of the Debtor’s business and the events leading to the commencement of this case.

### ***The ILEC Proceedings***

4. As discussed in the Initial Report, Infotelecom’s contract with AT&T is an interconnection agreement based on AT&T’s agreement with Level 3 Communications, LLC (as amended, the “ICA”). The ICA requires Infotelecom to pay a rate of \$0.00035 for all VoIP traffic that is delivered to an AT&T incumbent local exchange carrier (“ILEC”) for termination. In addition to paying AT&T at the \$0.00035 rate, on a monthly basis, Infotelecom calculates the amount it would have paid for this traffic had it been subject to higher switched access charges. Infotelecom and AT&T refer to the difference between the ICA rate and the higher traditional

switched access rate as the “Delta.” If a monthly Delta for traffic sent to a particular AT&T ILEC exceeds \$500,000 in any state, the ICA requires Infotelecom to negotiate with AT&T a rate for the traffic covered by the Delta. If these negotiations are unsuccessful, the ICA requires Infotelecom to escrow the Delta until the FCC resolves the long-standing dispute over whether any access charges are owed to AT&T for this traffic.

5. The ICA escrow provision has never been triggered—Infotelecom’s traffic with a particular AT&T ILEC has never exceeded \$500,000 in a single month in any particular state. AT&T, however, interprets the escrow requirement differently and, in February and March of this year, demanded that Infotelecom escrow almost \$3 million for Deltas pertaining to traffic in Texas, California, Illinois, and Ohio. AT&T threatened to terminate the ICA unless Infotelecom gave into AT&T’s demands. Infotelecom attempted to negotiate with AT&T but could not reach a resolution.

6. In an effort to avoid the irreparable harm to its business that disconnection would cause, Infotelecom commenced an action in the United States District Court for the District of Connecticut (the “Connecticut District Court”) on May 5, 2011, seeking, among other things, (1) an order restraining AT&T from terminating the ICA or discontinuing services to Infotelecom and (2) a declaration that Infotelecom has not breached the ICA. On July 15, 2011, the Connecticut District Court granted AT&T’s motion to dismiss Infotelecom’s declaratory judgment claim, holding that it lacked jurisdiction to interpret the ICA.<sup>2</sup> Infotelecom appealed this decision to the United States Court of Appeals for the Second Circuit (the “Second Circuit”), and that appeal remains pending.

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<sup>2</sup> In the same action, Infotelecom asserted a claim against AT&T for discriminating against Infotelecom in violation of federal telecommunications laws by, among other things, demanding escrows of Infotelecom that it does not require from similarly-situated LECs. This claim was not dismissed and remains pending before the Connecticut District Court.

7. In addition to the federal court action, Infotelecom has commenced proceedings against AT&T ILECs with public utility commissions (the “Commissions”) in California, Michigan, Illinois, Texas, Indiana, and Ohio (the “ILEC Proceedings”). In the ILEC Proceedings, Infotelecom has requested determinations that (1) Infotelecom has not breached the ICA escrow provisions and (2) the AT&T ILECs must cease all efforts to terminate the ICA and disconnect Infotelecom.

8. The ILEC Proceedings are purely defensive in nature—brought in response to AT&T’s threats of imminent disconnection which would irreparably harm Infotelecom’s business. Indeed, Infotelecom seeks nothing from the AT&T ILECs except for its fees and costs incurred in connection with having to bring the the ILEC Proceedings.

9. The AT&T ILECs, however, are using the ILEC Proceedings to continue pursuing their interpretation of the ICA and their efforts to extract as much cash as possible from Infotelecom. In their responses to Infotelecom’s complaints, the AT&T ILECs have demanded that Infotelecom immediately escrow several million dollars to avoid disconnection. In its response to Infotelecom’s complaint in the Texas ILEC Proceeding, for example, AT&T candidly states: “[t]o avoid the termination that it asserts as irreparable harm, Infotelecom need only pay into escrow the amounts it is supposed to have paid under the parties’ contract.” *See* AT&T Texas’ Response to the Petition of Infotelecom for Post-Interconnection Dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand (the “Texas Response”). A true copy of the Texas Response (without attachments) is attached to this Motion as Exhibit A. Additionally, in the Texas ILEC Proceeding, AT&T moved for the Commission to require Infotelecom to post a bond or provide other security in the amount of \$45,162.90.

10. AT&T's responses in other ILEC Proceedings are consistent with AT&T's approach—the AT&T ILECs persist in their position that Infotelecom must pay up according to AT&T's aggressive interpretation of the ICA or suffer disconnection and termination.

***AT&T's Stay Violations***

11. On the Petition Date, Infotelecom filed a Notice of Bankruptcy Filing and Suggestion of Stay with each of the Commissions. True copies of such notices are attached to this Motion as Exhibit B.

12. Despite this prompt notice, AT&T Texas filed its Opposition to Infotelecom's Assertion that the Bankruptcy Stay under 11 U.S.C. 362 Applies to this Proceeding (the "Texas Opposition") with the Texas Commission on October 19—one day after the Petition Date. AT&T filed the Texas Opposition without seeking relief from this Court.

13. A day later and again without seeking relief from this Court, AT&T Indiana filed similar papers with the Indiana Commission (the "Indiana Opposition").

14. On October 21, AT&T entities filed similar oppositions in Ohio (the "Ohio Opposition") and Illinois (the "Illinois Opposition," and collectively with the Texas Opposition, the Indiana Opposition, and the Ohio Opposition, the "Oppositions"). True copies of the Oppositions (without attachments) are attached to this Motion as Exhibit C.

15. In the Oppositions, AT&T urges the Commissions to ignore the Debtor's bankruptcy filing and adjudicate AT&T's rights vis-à-vis the Debtor. The Debtor anticipates that AT&T will assert that the automatic stay does not apply in all of the ILEC Proceedings and in the Connecticut District Action on appeal.

16. Perhaps more egregiously, on October 20, 2011, AT&T suspended certain of the Debtor's accounts in order to prevent AT&T end-users from porting their phone numbers to new carriers on the Debtor's network.

17. By filing the Oppositions, AT&T is requiring the Debtor to incur unnecessary expense in responding to the Commissions. By suspending certain accounts, AT&T is disrupting the Debtor's business operations and jeopardizing the Debtor's relationships with customers.

### **Relief Requested**

18. The Debtor respectfully requests entry of an order (i) enforcing the automatic stay against AT&T and (ii) awarding to the Debtor sanctions in the form of its fees and expenses incurred in connection with and as a result of AT&T's willful stay violations and scheduling a subsequent hearing to consider the appropriate amount of those sanctions.

### **Basis for Relief**

19. Upon the filing of a bankruptcy petition, the automatic stay imposes an immediate, broad injunction that protects the debtor and its property. 11 U.S.C. § 362(a); *In re Hardesty*, 442 B.R. 110, 113 (Bankr. N.D. Ohio 2010) (stating that the "scope of the automatic stay is broad, and will operate to enjoin essentially any act by a creditor, whether the commencement or continuation thereof, to recover on prepetition claims"). The stay is "among the most fundamental debtor protections in bankruptcy law." *In re Cousins*, 404 B.R. 281, 286 (Bankr. S.D. Ohio 2009) (citing legislative history for the proposition that the stay gives debtors a "breathing spell" from all collection efforts and harassment).

20. The automatic stay applies to the ILEC Proceedings. The Court should enter an order enforcing the stay against AT&T and awarding sanctions against AT&T for its willful stay violations.

**A. The automatic stay applies to the ILEC Proceedings.**

21. In the Oppositions, the AT&T ILECs allege that the stay does not apply to the ILEC Proceedings simply because the Debtor initiated such proceedings. Despite courts' consistently expansive interpretation of Section 362's scope, the AT&T ILECs narrowly interpret a particular phrase in a particular subsection of Section 362 to argue that the ILEC Proceedings fall outside the stay's protection.

22. Section 362(a)(1) provides that the filing of a bankruptcy petition stays "the commencement or continuation...of a judicial, administrative, or other action or proceeding **against the debtor** that was or could have been commenced before the commencement of the case under this title, or to recover a claim **against the debtor** that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1) (emphasis added). The AT&T ILECs assert that the phrase "against the debtor" means that actions brought **by** a debtor are never subject to Section 362. Texas Opposition ¶ 4; Indiana Opposition ¶ 4. This argument flies in the face of the facts surrounding the ILEC Proceedings, the plain language of Section 362, and binding Sixth Circuit precedent.

23. The Debtor initiated the ILEC Proceedings only to defend against the Hobson's choice offered by AT&T: fund exorbitant escrows or face disconnection. In the ILEC Proceedings, the AT&T ILECs demand that the Debtor escrow several million dollars to avoid termination and disconnection. A cursory review of the dockets in the ILEC Proceedings demonstrates that AT&T is the aggressor. AT&T, however, asks the Commission to ignore this reality and focus solely on the fact that the Debtor's name appears to the left side of the "v."

24. Unlike AT&T, courts in this circuit do not elevate form over substance. The United States Court of Appeals for the Sixth Circuit recognizes that the automatic stay bars the

commencement or continuation of any action “which would inevitably have an adverse impact upon the property of the estate.” *In re Nat’l Century Fin. Enters., Inc.*, 423 F.3d 567, 578 (6th Cir. 2005) (quoting *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 392 (2d Cir. 1987)). In fact, in *Nat’l Century*, the Court held that the automatic stay applied to an action in which the debtor was not even a party. *Id.* at 575-576 (holding that an action to obtain accounts receivable held in trust for a debtor’s subsidiary was barred by the automatic stay. Although the lawsuit had not been filed against the debtor, it required a determination concerning the debtor’s entitlement to certain property. *Id.* at 578 (recognizing that the “automatic stay of § 362(a) applies by its terms not only to actions against the debtor...but also to actions seeking to obtain property of the bankruptcy estate”) (internal citations omitted).

25. Similarly, in *Cathey v. Johns-Manville Sales Corp.*, the Sixth Circuit looked beyond the caption of an appeal filed by a debtor to determine that the automatic stay barred continued litigation. *See* 711 F.3d 60, 61 (6th Cir. 1983). Because the action in the lower court was prosecuted against the debtor, the appeal, though initiated by the debtor, was stayed. *Id.*

26. Courts routinely consider whether actions taken by creditors are offensive or defensive in nature to determine whether such actions are prohibited by the automatic stay. *See, e.g., In re Bryner*, 425 B.R. 601 (B.A.P. 10th Cir. 2010) (holding that filing a claim objection against a Chapter 7 debtor did not violate the automatic stay because claim objections are defensive in nature). It is only logical for courts to conduct this same inquiry in determining whether the stay applies to actions commenced by a debtor.

27. In the Oppositions, AT&T cites cases involving offensive actions—actions that courts properly held were not stayed because the debtors were actively prosecuting claims that would, if successful, enhance the debtors’ estates. *See, e.g., Matter of U.S. Abatement Corp.*, 39



F.3d 563, 568 (5th Cir. 1994) (debtor's counterclaims in contract dispute were not stayed because debtor sought an award of damages); *In re Merrick*, 175 B.R. 333, 337 (B.A.P. 9th Cir. 1994) (debtor's action to collect \$1 million in fraud damages not stayed); *Carley Capital Group v. Fireman's Fund Ins.*, 889 F.2d 1126 (D.C. Cir. 1989) (debtor's action for damages under insurance contract not stayed). These cases are inapposite to the ILEC Proceedings—defensive proceedings in which the Debtor merely seeks to preserve its contractual rights and protect property of the estate, not to enhance those rights or recover on a damages claim.

28. In a similar case, the United States District Court for the District of Kansas held that the automatic stay applied to a debtor's declaratory judgment action because the action carried risk for the debtor's estate. *E<sup>3</sup> Biofuels-Mead, LLC v. QA3 Financial Corp.*, 384 B.R. 580, 582 (D. Kan. 2008). In *E<sup>3</sup> Biofuels-Mead*, the debtor sought a declaration that it was not liable for fraud, breach of contract, misrepresentation, or conversion. *Id.* at 581. The court explained: "The rationale behind Section 362(a)(1)...is to distinguish actions against a debtor from actions by the debtor because actions by the debtor usually produce recovery for the bankruptcy estate." *Id.* at 582. Because the debtor's declaratory judgment action subjected the bankruptcy estate to substantial risk, the automatic stay applied. *Id.*

29. Like the civil action in *Nat'l Century* and the declaratory judgment action in *E<sup>3</sup> Biofuels-Mead*, the ILEC Proceedings are actually actions against the Debtor and are stayed by Section 362(a).

30. Moreover, because the Debtor seeks to preserve contractual rights for the estate's benefit, the ILEC Proceedings are stayed by Section 362(a)(3). 11 U.S.C. § 362(a)(3) (providing that the stay bars any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate). It is well-settled that a debtor's contract

rights are property of the estate and that such rights fall within the automatic stay's protection.

*In re Clearwater Natural Resources, LP*, 421 B.R. 392, 400 (Bankr. E.D.K.Y. 2009) (stating that executory contracts are property of the estate and holding that the automatic stay prevented counterparty from declaring a *force majeure* event under an executory contract).

31. The Debtor's rights under the ICA are integral to its ability to protect the value of its business and to formulate a plan of reorganization. The Debtor commenced the ILEC Proceedings precisely to protect these rights.

32. The automatic stay of Sections 362(a)(1) and (3) bars the continuation of the ILEC Proceedings. Therefore, the Debtor requests that the Court enter an order pursuant to Sections 105(a) and 362 of the Bankruptcy Code requiring AT&T to immediately cease all activity in the ILEC Proceedings pending further orders of this Court.

**B. AT&T willfully violated the automatic stay and should be sanctioned.**

33. Section 362(k) provides that debtors injured by willful stay violations "shall recover actual damages, including costs and attorneys' fees."<sup>3</sup> A violation of the automatic stay is willful if the violator knew of the stay and intentionally committed the violative act. *In re WVF Acquisition, LLC*, 420 B.R. 902, 910 (Bankr. S.D. Fla. 2009) (sanctioning internet service provider for terminating debtor's service and "attempting to strong-arm a general release from the [d]ebtor"). Additionally, it is well-settled that courts may award compensatory damages for stay violations as part of their civil contempt power under Section 105 of the Bankruptcy Code. *WVF Acquisition*, 420 B.R. at 913. The Debtor promptly notified AT&T of its bankruptcy filing

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<sup>3</sup> AT&T may question whether corporate debtors are "individuals" entitled to damages under Section 362(k). As a number of courts have noted, "it seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section, and we construe the word 'individual' to include a corporate debtor." *In re Howard*, 428 B.R. 335, 339 n. 2 (Bankr. W.D. Pa. 2010) (quoting *Budget Serv. Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986)).

by filing notices in the ILEC Proceedings. AT&T immediately responded by filing the Oppositions, forcing the Debtor to incur the expenses associated with filing this Motion and responding to the Oppositions in the ILEC Proceedings. AT&T tacitly admitted that the Texas Opposition violated the automatic stay by stating in the last sentence of that document that AT&T would not pursue its Motion for Security at this time. Texas Opposition, p. 4.

34. Additionally, AT&T suspended certain of the Debtor's accounts, causing damage to the Debtor.

35. Under Sections 105(a) and 362(k), the Debtor respectfully requests that the Court award the Debtor sanctions in the form of its fees and expenses incurred in connection with AT&T's willful stay violations and scheduling a hearing to consider the appropriate amount of those sanctions.

### **Conclusion**

36. Just as its pursuit of the Debtor under an aggressive interpretation of the ICA necessitated the Debtor's commencement of the ILEC Proceedings, AT&T's responses to the Debtor's bankruptcy filing based on a narrow, legally incorrect, and self-serving interpretation of Section 362(a)(1) have necessitated prompt action by the Debtor in this Court and in the Commissions. AT&T's interpretation of Section 362 defies reason and is inconsistent with binding precedent. The Court should enforce the stay against AT&T and sanction AT&T for its violation of the stay.

### **No Prior Request**

37. No prior request for the relief sought by this Motion has been made to this or any other Court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order (i) enforcing the automatic stay against AT&T, (ii) awarding the Debtor sanctions in the form of its fees and expenses incurred in connection with AT&T's willful stay violations and scheduling a hearing to consider the appropriate amount of those sanctions, and (iii) granting to the Debtor such other relief as is just.

Dated: October 21, 2011

Respectfully submitted,

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**PROPOSED ATTORNEYS FOR INFOTELECOM, LLC**

### **CERTIFICATE OF SERVICE**

I certify that on October 21, 2011, I served true copies of the foregoing Motion via electronic mail to Thomas J. Horn (Thomas.horn@att.com), Kathleen S. Hamilton (Kathleen.s.hamilton@att.com), J. Tyson Covey (jcovey@mayerbrown.com), and Dennis G. Friedman (dfriedman@mayerbrown.com), attorneys for AT&T. I also served true copies of the foregoing Motion via the Court's ECF System or overnight mail, postage prepaid, to:

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Kentucky, and AT&T North Carolina  
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